No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

BRIEF FOR RESPONDENT.

ROBERT L. REID,
P.O. Box 1870,
305 Wall Street,
Las Vegas, Nevada 89101,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Page

Rules

Statutes

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

BRIEF FOR RESPONDENT.

Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondent ("Teamsters") on April 12, 1966, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's decision and order in the unfair labor practice proceeding (R. 57-58)[1] are reported at 157 NLRB 1621. The Board's

[1]References to the pleadings, the Board's decision and determination of dispute, the Board's decision an order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to the portions of the stenographic transcript of the Section 10(k) proceeding reproduced pursuant to Court Rule 10 are designated "Tr." The abbreviations "T. Exh.," "IBEW Exh.,"

(This footnote is continued on the next page)

earlier decision and determination of dispute in the underlying Section 10(k) proceeding (R. 73-84) are reported at 150 NLRB 504.

Statement of the Case.

On February 27, 1952, while the Nevada Company was the prime support contractor for AEC at the test site, and before this function was taken over by REECO in December 1952, an agreement allocating work tasks involved in the warehousing and transportation of electrical materials was negotiated between international representatives of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (IBT) and of the International Brotherhood of Electrical Workers (IBEW) (T Exhibits 6A and 6B), and was executed upon their direction by William F. Carter, Secretary-Treasurer of Teamsters Local #631 and Ralph A. Leigon, Business Manager of Electricians Local #357.

The immediate circumstances which gave rise to the Carter-Leigon agreement were these: The Nevada Company was doing its electrical work at the test site through a subcontractor, Newberry Electric, which had set up a warehouse and yard at Mercury, Nevada, devoted exclusively to the warehousing of electrical material. Electricians were receiving, spotting, and issuing these materials, and delivering the materials by work trucks from the warehouse to points of fabrication and use in the forward areas. The teamsters pro-

"REECO Exh.," and "Bd. Exh." refer respectively to exhibits introduced at the 10(k) hearing by the Teamsters, International Brotherhood of Electrical Workers ("IBEW"), Reynolds Electrical & Engineering Company, Inc. ("REECO") and the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tested this as an assignment of work covered by their traditional jurisdiction and their contract to another craft. At the instance of the Nevada Company, the two Internationals sent in representatives, who, after an on-the-spot investigation, directed the local union officials to execute the Carter-Leigon Agreement (Tr. 1798, *et seq.*); (Tr. 1018, *et seq.*).

It will be observed that the Carter-Leigon Agreement:

1. Was an agreement between the two local unions, pertaining specifically to work at the "Nevada A.E.C. Test Site."

2. It was not limited to any particular employer, but was intended to cover the entire test site and all operations carried on there by any employers employing Teamsters and Electricians, (Tr. 1045; Tr. 1813; Tr. 1707).

3. It incorporated, by physical attachment and reference, the February 11, 1942 agreement between the IBT and the IBEW (T Exh. 6B). This agreement awarded *general jurisdiction over the delivery of electrical materials to the Teamsters,* but recognized an *exception* in the case of vehicles which carry the electrical work crew and material to the job site where the vehicle remains at the jobsite with the men in the performance of electrical work and is an integral part of the work. In other words, it defined the types of vehicles which electricians might use in terms of their function.

4. The Carter-Leigon agreement provided that such vehicles, referred to as "crew or line" trucks, shall be loaded by either Teamster warehousemen or by a composite crew of Teamsters and Electricians at the start

of the shift, and when so loaded should be operated by an electrician, but that all materials required during the shift "other than loaded as above" shall be requested from the *"warehouse or yard"* and delivered by vehicles operated by Teamsters. In other words, the Carter-Leigon agreement further restricted electricians by providing that even where work trucks were used, they might carry materials only on the first load of the shift.

5. The Carter-Leigon agreement further provided that in warehouses where electrical material was stored exclusively, there should be a composite crew of Teamster Warehousemen and Electricians, as nearly as possible on a one to one ratio, storing electrical material. This was, apparently, a *quid pro quo* for the restriction placed on electricians after the first load of the shift—since by this provision Teamsters conceded the right of electricians to participate in warehousing work in warehouses where electrical materials were stored exclusively.

The evidence shows that a number of months after the signing of the Carter-Leigon agreement, both the employer and the two unions adhered to the agreement—there was composite staffing of the electrical warehouse and yard, and teamster truckdrivers delivered materials other than on the first load of the shift transported by work trucks driven by electricians.

After REECO became prime support contractor in December 1952, it commenced building a permanent warehouse complex at Mercury, Nevada, about three quarters of a mile inside the main gate at the test site (REECO Exh. 42). REECO's warehousing operation was placed under the Supply Department. The General

Stores Division of the Supply Department handled all materials and supplies (with the exception of Equipment Parts) in mixed warehouses storing materials and supplies used by plumbers, carpenters, sheetmetal workers, ironworkers, painters and laborers, as well as those used by electricians. In other words, in its permanent warehouses at Mercury, as well as in the permanent warehouses established after 1958 at Area 12 (REECO Exh. 46), Well 3 Yard (REECO Exh. 42), and Warehouse C (REECO Exh. 44), REECO did not maintain a separate warehouse for storage of electrical materials only (Tr. 908; Tr. 1049).

REECO, though not a prime support contract until December 1952, had been a contractor for AEC at the test site since 1948. As such, and by virtue of its membership in the Southern Nevada Chapter, Associated General Contractors of America, Inc. (AGC), ever since 1948 REECO had been a party to a series of collective bargaining agreements between the AGC and the local building trade unions, covering all contractors in the construction industry in Southern Nevada (REECO Exh. 5). Teamsters Local #631 was a party to these agreements. After the IBT left the AFL-CIO and the local building and construction trades council, the Teamsters entered into separate agreements with the AGC. The current agreement between Teamsters Local #631 and AGC, to which REECO is a party, (herein called "AGC Agreement"), bears the effective date of June 1, 1962 and expires May 31, 1965 (T Exh. 5). Consequently, REECO was a party to collective bargaining agreements with Teamsters, both at the time of the making of the Carter-Leigon Agreement, and concurrently.

REECO learned of the Carter-Leigon Agreement at the time it was made, or at least shortly after becoming prime support contractor in December, 1952, (Tr. 1883). It is undisputed that REECO recognized and adhered to the provisions of the Carter-Leigon Agreement at all times since* (with periodic lapses and reaffirmances, as hereinafter noted). Indisputably, the Carter-Leigon Agreement was followed by REECO with respect to the assignment of the work of warehousing electrical materials at the permanent warehouses of its Supply Department and the delivery of such materials to forward area electrical shops and points of use (Tr. 1859; Rogers, Tr. 1906; Tr. 1051). Since, under its mode of operation, electrical materials were stored in mixed-material warehouses, there was no occasion to invoke the composite warehouse staffing arrangement contained in the last paragraph of the Carter-Leigon Agreement. Teamster warehouse clerks received and issued electrical materials at the Supply Department warehouses and yards. Teamster warehousemen and forklift operators off-loaded, placed, and loaded such materials, and Teamster truck drivers, assigned from the Teamster Motor Pools for Supply Department work, delivered electrical material by truck from the Supply Department warehouses and yards to forward area electrical shops and points of use. This was also the practice with respect to materials used by plumbers, carpenters, ironworkers, sheetmetal workers, painters, cement masons, and laborers. (Tr. 528).

---

*In its decision upon the Section 10(k) phase of this proceeding, the Board found (p. 4): "The record shows that from the time of its execution REECO followed the Carter-Leigon Agreement in making work assignments, and has referred to and relied upon said agreement as a basis for resolving conflicts which arose between Teamsters and IBEW."

The only exception was that electricians would carry their own electrical materials by work truck on the first load of the shift, as provided in the Carter-Leigon Agreement.

It should be borne in mind in this connection that forward area "compounds" of the size, scope, and permanence of those now existing in Area No. 3 (REECO Exh. 6) and Area No. 9 (REECO Exhs. 24 and 33) did not come into existence until the lifting of the test moratorium in September 1961. The evidence shows that during the earlier period before the commencement of the tunnel testing program in 1958 and of the underground testing program thereafter, material stockpiles in the forward areas were kept at a minimum and 50%, or more, of all materials were delivered directly to the points of use where they were fabricated and installed by the crafts (including electricians)—(Tr. 564), and that the remaining materials which were delivered to forward area craft shops for fabrication remained there just long enough to be fabricated and then sent out to the point of use. There was little or no storing or stockpiling of materials in the forward areas for future use.

Although, generally speaking, REECO adhered to the Carter-Leigon Agreement, there was a gradual whittling away of its provisions by electricians seeking to expand their work assignments at the expense of the Teamsters (Tr. 156, 160; Tr. 1460, 1463; Tr. 1269). Teamsters would protest these practices to REECO, REECO would correct the condition and the situation would "simmer down", only to "steam up" again at a later occasion (Tr. 163).

A critical point was reached in the Spring of 1957 (Tr. 162). Electricians began to order out large quan-

tities of materials from the general warehouses at Mercury to their electrical shop in Mercury and would then transport these materials to forward areas in their work trucks (Tr. 157). The Electricians also established an electrical "storage depot" (forerunner of the present-day electrical compounds) at a forward area known as the "Y" or "BJY", located about 27 miles out of Mercury (Tr. 156-166). From this depot they would transport electrical materials in their work trucks to various points of use in adjoining forward areas (Tr. 156-166) There were also violations by electricians of the first load of the shift provision of the Carter-Leigon agreement (Tr. 157; Tr. 1885; Tr. 1405).

To protest these practices, the Teamsters engaged in a work stoppage commencing May 9, 1957. REECO sent two of its Vice-Presidents, Clark and Brennan, to survey the situation. Both men appeared at a membership meeting of Teamsters Local 631 held on or about May 11, 1957 and gave assurance that the problem would be resolved to the satisfaction of the Teamsters and requested the Teamsters to return to work. (Tr. 1837; Tr. 1407, 1408). A Memorandum of Understanding was signed May 11, 1957 (T Exh. 20), and the Teamsters returned to work on Monday, May 13, 1957. The two REECO Vice-Presidents continued to survey the situation, and, ultimately, on their instructions, L. J. Reynolds, Jr., assistant project manager, wrote a letter on June 15, 1957 setting forth the work assignments (T Exh. 7).

Paragraph 5 of this letter shows REECO's recognition of the Carter-Leigon agreement. All of the 1942 General Presidents' Agreement is quoted verbatim, as

well the first two paragraphs of the Carter-Leigon Agreement. The wording of this paragraph clearly shows that REECO recognized that the generality of the handling and hauling of electrical materials was Teamster work, and that under the Carter-Leigon agreement "electricians are *permitted* to handle and haul material *on the first* trip of the day" only. The composite staffing provisions of the Carter-Leigon agreement was not quoted, for the obvious reason that at that time there were no electrical warehouses recognized as such. Consequently, warehousing of electrical materials in mixed warehouses was implicitly recognized as Teamster work.

Paragraphs 3 and 6 are also significant. Paragraph 3 recognizes that fabricated material taken from electrical and other craft shops is *loaded* by the craft in question. However, Paragraph 3 does not state that such material is to be *hauled* to the point of use by such craft, and, read together with Paragraph 5 would, therefore mean (so far as pertains to the electricians), that electricians may haul such material on the first trip of the day only.

As to the other crafts—plumbers, carpenters, ironworkers, and the like—the evidence is overwhelming that teamsters assigned to the forward areas in question have normally hauled both fabricated and unfabricated materials from the craft shops to the points of use, including the first load of the shift, with loading at the shop and off-loading at the point of use being accomplished by the craft in question, or by operating engineers when power equipment was required.

Paragraph 6, read in juxtaposition to Paragraphs 5 and 3, makes it clear that the "first load of the shift" limitation is placed only upon electricians doing construction work, and that there is no similar restriction upon maintenance crews.

After making its work assignment award on June 15, 1957 (T Exh. 7), REECO proceeded to take corrective action. It took away a large number of vehicles from the electricians which had previously been assigned to them (Tr. 1840, 1857; Tr. 1917), and required electricians to leave their work trucks in the forward areas and ride Teamster-driven buses from their reporting points to their jobsites, as the other crafts had been doing for some time (Tr. 1840; Tr. 1907; Tr. 1449, 1458, Tr. 1390-1393). REECO also began to enforce again the "first load of the shift" provision of the Carter-Leigon agreement. A teamster warehouse clerk was installed at BJY about a year later, (Tr. 158). Ultimately, REECO disbanded the depot at BJY altogether and moved the materials stored there to the tunnels at Area 12.

There is substantial conflict in the testimony as to the extent to which vehicles other than work trucks—in particular, unmodified flatrack delivery trucks—were assigned to electricians prior to the lifting of the test moratorium in September 1961. Substantial evidence points to the fact that there were few flatrack trucks assigned to the electricians prior to 1960 or 1961, (Tr. 163; Tr. 1455; Tr. 1295, 1269-1270; Tr. 1393-1394). Assignment of flatrack trucks to electricians was uniformly protested by Teamsters when it occurred (Tr. 1282-1287) as a violation of the Carter-Leigon agreement, upon the theory that such trucks

were essentially delivery vehicles, rather than work trucks within the Carter-Leigon definition of "crew or line trucks." In one instance, three flatrack trucks were taken away from electricians in Area 410 as a result of a Teamster protest, (Tr. 163; Tr. 1395).

Commencing in 1960, and, more particularly, since the lifting of the test moratorium in September 1961, REECO commenced to assign more and more vehicles of various types (including flatrack trucks) to electricians working in the forward areas. Coincidentally, forward area compounds, of which the compounds in Area #3 and Area #9 are illustrative (REECO Exhs. 6, 24, and 33), were constructed in various forward areas, as the AEC testing programs shifted into such areas. These forward area compounds cover many acres of land, are served by roads, contain semipermanent or permanent buildings used as craft shops by electricians, plumbers, carpenters, etc. with contiguous areas, often fenced, where craft materials are stored. In Area #3 compound there are two fenced electrical compounds, one being the general electrical compound and shops (REECO Exh. 6-G) and the other, the fabrication yard (REECO Exh. 6-H), where coaxial cable is spliced and fixtures are attached to the cable ends prior to the transportation of such cable to points of use in the field—mainly within a 3-mile radius of the compound (Tr. 353; Tr. 608). In Area 9, the major part of such cable splicing activities is carried on at the points of use, in portable splicing shacks, and, with some variations, depending upon the readiness of the test hole to receive cable, a large part of the cable used in Area #9 is delivered directly to the points of use by Teamster truck drivers dispatched

either from the Supply Department cable yard at Area 12, or from the Supply Department central warehouses and yards at Mercury, (Tr. 608).

From the standpoint of REECO's administrative organization, the Supply Department maintains permanent warehouses and yards at Mercury (REECO Exh. 42); Area #12 (REECO Exh. 45 and Exh. 46); Well 3 Warehouse Yard (REECO Exh. 43); and Warehouse "C" (REECO Exh. 44; Tr. 908). The first two locations serve REECO's Construction Department; the second two locations serve REECO's Drilling and Tunneling Department. The Supply Department accounts for all materials and supplies under a perpetual inventory system. The permanent warehouses of the Supply Department are staffed by Teamster Warehouse personnel (Warehouse Foremen, Warehouse Clerks (receiving and issuing), Warehousemen and Forklift Operators) working under the AGC Agreement (T Exh. 5). The supply Department also has assigned to it out of the Teamster Motor Pools at Mercury and Area #12, Teamster truckdrivers working under the AGC Agreement. Materials of all crafts to be delivered from Supply Department Warehouses to forward area compounds or points of use are loaded and hauled by Teamster personnel (except for the first load of the shift carried on electrician's work trucks), and this phase of the operation is not a point at issue in this proceeding.

The forward area compounds, like those in Area #3 and Area #9, are under the aegis of REECO's Construction Department. For purposes of REECO's internal accounting, when materials or supplies are needed in the forward areas, they are requisitioned from

the Supply Department by the Construction Department by means of a RMS (Request for Materials and Services (REECO's Exh. 48), pursuant to specific work orders, and are either filled by the Supply Department from inventoried items on hand, or are procured from outside suppliers by stock order or special order, (Tr. 937). In either case, once such requisitioned materials are delivered to a forward area compound, the Supply Department treats them as having been "sold" to the Construction Department (Tr. 936, 937). They are taken off the inventory of the Supply Department and are henceforth deemed expendable. Although requisitioned by work order number, the evidence shows that, in fact, such materials are often stored for from three to twelve months in the forward area compound, awaiting use (Tr. 485); that it is common practice to order 5% to 10% more material than is actually needed as a "cushion", and that often materials ordered by work order number for one wellhole will be used on another (Tr. 487; Tr. 1606). The REECO Exhibits 6, 24 and 33 give some indication as to the volume of materials on hand at a given time in these forward area compounds. REECO Exhibit 51 is indicative of the dollar volume of materials issued and returned to the General Store Division of the Supply Department for the months of June, September and December 1963, and March 1964.

A crew of Teamster truck drivers, under a Teamster foreman, and driving 1# ton to 5-ton flatracks, semi-trailers, water trucks, and other vehicles, is assigned to each forward area compound to support the electricians, plumbers, carpenters, and other crafts working in and out of the compounds (Tr. 1674; Tr. 1591;

Tr. 1512, 1517; See, also REECO's Exh. 55, showing number of Teamster truck drivers assigned to construction and drilling departments in various areas of NTS, and compare REECO Exhs. 53 and 54, showing like distribution of other crafts through forward areas). The vehicles assigned in the forward compounds for the use of crafts other than the electricians are in large measure limited to small pick-ups, carry-alls, and power-wagons. The evidence shows quite conclusively that (except for occasional localized "jurisdictional" skirmishes when a plumber or carpenter may load more in his pick-up than the Teamster thinks he should—all of which disputes are settled in the field at the ship steward level), the Teamsters' in the forward area compounds haul by means of trucks assigned to them all fabricated and unfabricated materials from the craft shops of all crafts, except the electricians, to the points of use where such materials are to be installed, (Tr. 1517, 1518). The evidence also shows that until the Summer or Fall of 1963, Teamsters hauled certain items from the electrical compounds to the points of use, such as, portable splicing shacks, generators, panel boards (REECO'S Exh. 22), transformer trailers (REECO Exh. 19), and returned empty cable reels from the points of use to the electricians' compounds (Tr. 1519), but that within the last nine months, or year, there has been a gradual "phasing out" of the Teamsters from all hauling for the electricians, (Tr. 1527, 1528). During the same period of time, large numbers of vehicles (including flatrack trucks not modified for use as work trucks by the installation of reel-racks, booms, tool and part cribs, and the like) have been assigned by REECO for the use of electricians in the forward compounds, (Tr. 1537).

Teamster stewards and business agents had continuously protested what they considered to be an encroachment by the electricians upon work assigned to the Teamsters by the Carter-Leigon agreement and the 1957 work assignment award, (Tr. 1859). Such protests were usually met by REECO requests that the union furnish specific times, places and occasions, and promises to investigate and correct any mis-assignments if the complaints were found to be warranted, (Tr. 1850). Implicitly, therefore, REECO recognized the Carter-Leigon agreement and the 1957 work assignment award to be in effect in the forward areas, but only asked for proof of violations, (Tr. 1924). Finally, on November 18, 1963, the Teamsters addressed a letter to REECO, itemizing by Truck Number certain flatrack trucks used by electricians in Areas #3 and #9 in violation of the Carter-Leigon agreement, and the 1942 General Presidents'Agreement between the IBT and the IBEW which was incorporated in the Carter-Leigon agreement (T Exh. 10). *Since the letter made reference to Article III-E of the AGC Agreement, freeing the union of its no-strike pledge as to a contractor failing to implement an arbitration award or an International Presidents' award under Article III-D, it is evident that the Teamsters regarded the Carter-Leigon agreement (negotiated at the International level and embodying the agreement of the International Presidents of IBT and IBEW) as "determinations reached by the International Presidents of the Unions involved." It should be noted, also, that the 1948 AGC agreement (REECO Exh. 5) was in effect when the Carter-Leigon agreement was signed and contained in Article III-F substantially the same provisions as are now contained in Article III-D of the current AGC agreement* (T Exh. 5).

The evidence shows that REECO failed to follow up the grievance set forth in Teamsters' Exhibit #10 until prompted to do so by a series of telephone calls from Carter to Lemon, REECO'S Director of Industrial Relations (Tr. 1872-1873). A conference followed, at which REECO, for the first time, took the position at the top management level that the forward area compounds were part of the jobsite, rather than "warehouses, shops or yards" within the meaning of Article 1-B of the AGC Agreement, and that once the materials had reached the electricians' compounds in the forward areas, this constituted the "first drop", and that all hauling beyond that point was the work of the electricians, (Tr. 1869). Further conferences followed, (Tr. 2022). REECO did not reply formally to the Teamster grievances set forth in the letter of November 18, 1963 (T Exh. 10) until April 1, 1964 (T Exh. 12). It is noteworthy that the formal reply followed by one day the submission of this grievance by the Teamsters on March 30, 1964 (T Exh. 11) to the grievance and arbitration machinery of the AGC Agreement. *It is also noteworthy that in REECO'S formal reply, it did not deny the applicability of the Carter-Leigon agreement to hauling electrical material between the forward compounds in Areas #3 and #9 and the points of use (which was the subject of the Teamsters' complaint), but took the position that "the above mentioned Understanding and Agreement is being complied with in the instances cited by your November 18, 1963, letter and the accusation of jurisdictional violation is unfounded."*

The AGC Joint Conference Board, consisting of both employer and union representatives, met early in April to consider the grievance. After the initial hearing, the

Board reconveyed at the test site to make an on-the-job investigation of conditions. It is undisputed that both REECO and Teamsters Local #631 were represented at, and participated in, both the initial hearing and the inspection trip to the test site. There is substantial evidence tending to show that REECO at no time during these proceedings questioned the authority of the AGC Board to hear and determine the grievance, (Tr. 2027).

On April 30, 1964, the AGC Board rendered its unanimous award (T Exh. 13). Immediately after rendition of the award, the Teamsters asked REECO to put the award into effect (Tr. 149). REECO asked for time to study the award. On May 15, 1964, REECO asked the AGC Board to clarify "this adverse award" in certain particulars, and, for the first time—raised the contention that the "award appears to be a determination of a jurisdictional dispute" which should have been resolved by the machinery of Article III-D of the AGC Agreement (T Exh. 14). On May 7, 1964, the AGC Board rendered a clarification of its award (T Exh. 15).

A fair reading of the April 30th award, the May 5th request for clarification, and the May 6th letter of clarification will show, we believe, that the AGC Board held as follows:

1. That, while the Carter-Leigon agreement might be binding upon REECO, Teamsters Local #631, and Electricians Local #357, the AGC Board could give it no recognition for purposes of this proceeding because it had never been incorporated in the AGC Agreement with the requisite formalities.

2. That, apart from the Carter-Leigon Agreement, REECO's practice of having Electricians haul electrical materials from area compounds to points of use in trucks other than work trucks, is in violation of "established trade practice in the area", and, therefore, in violation of Article III-F of the AGC Agreement.

3. That, "insofar as the warehousing function was concerned," the Board made no finding of violation because in the three areas visited, Areas #3, #9, and #17, fabrication was going on in the electrical compounds and, for that reason, they must be regarded as electrical shops, rather than warehouses.

The above review summarizes both the earlier history and recent background of the dispute over the handling and hauling of electrical materials. It is clear from this review that all parties concede the right of Teamster personnel to load electrical material at REECO'S permanent warehouses, and to deliver this material by truck to electrical compounds in the forward areas. It is also clear that the focus of the dispute as to electrical materials was two-fold:

1. *Are the forward area electrical compounds to be considered "warehouses, shops or yards" within the meaning of Article I-B of the AGC Agreement so that warehousing within them, and trucking out of them, is to be performed by Teamster personnel within the classifications of that Agreement, or with a composite crew under the Carter-Leigon Agreement?* This question was resolved against the Teamsters as to the Areas #3, #9, and #17 electrical compounds by the AGC Board award.

2. *Are the Teamsters, under the AGC Agreement, the Carter-Leigon Agreement, and area practice, en-*

titled to haul electrical materials by truck from the forward area electrical compounds to the points of use? This question was resolved in favor of the Teamsters by the AGC Board, not under the Carter-Leigon Agreement, but under area practice. Teamsters were, therefore, awarded the work of delivering electrical materials from compounds to points of use, except where deliveries were effected by work truck. Here again, we submit that a fair reading of the AGC Board award, in the light of the arguments which the Teamsters advanced to the Board and of the electrician activities which the Board found to violate area practice, shows that "work trucks" are to be defined in terms of function as trucks which "were required to stay on the job with the electrical crews and could not be used to shuttle back and forth between the yards and jobsites." (T #13).

As so often happens in labor disputes, however, there were other labor disputes in process between Teamsters Local #631 and REECO, which were more or less contemporaneous with the major dispute over the handling and hauling of electrical materials. *Different demands were made by the union at different times, and different union action was taken to implement different demands.*

1. Dispute Over Receiving Clerk in the Mixed-Materials Compounds.

On January 8, 1964, Teamsters Local #631 addressed a letter to REECO protesting the assignment of warehouse work in the mixed-materials compound in Area #9 compound by operating engineers, laborers and a non-manual (white collar) clerk (REECO Exh. 1). This letter was written by Carter pursuant

to complaints received from his steward and without personal investigation (Tr. 2038). In February or early March, 1964, Carter and Lemon of REECO inspected this compound. Lemon agreed that there were inadequate controls being exercised over the receipt and issuance of materials from this compound (a fenced area within Area #9 compound in which materials used by all the crafts, but the electricians, is stored—See REECO Exhs. 33, 34, 35, and 36)—and promised that a Teamster warehouse clerk would be assigned to this compound, and similar mixed compounds in other areas (Tr. 2041-2042, 2047). Carter, for his part, agreed that there was insufficient work in this compound to create a full-time job for a Teamster forklift operator and that the compound could continue to be served by the Operating Engineer forklift operators working in the area. (Tr. 2041-2042, 2047).

Carter took this arrangement to constitute a definite commitment by REECO that a Teamster receiving clerk would be assigned to the mixed-materials compounds and a definite waiver on the part of the Teamsters Local No. 631 of its prior demand for a Teamster forklift operator in such areas, (Tr. 121, 124). The company failed to make the assignment, although, when Carter communicated with Lemon, Lemon affirmed that he had given orders that a receiving clerk be assigned, and stated that he did not know why they had not been carried out, (Tr. 2050-2051). Ultimately, Lemon admitted he had been overruled by top management.

On or about April 21, 1964, by prior arrangement between Carter and Groeniger, Labor Relations Director for the AEC Nevada Operations Office, Carter

and an AEC investigator toured the test site to study receiving and issuing practices in the various forward area compounds (Tr. 2060-61). Carter made this investigation because his truck drivers were complaining that there was no one in the mixed compounds with authority to tally-in deliveries and sign delivery receipts which would clear the drivers of responsibility for the items delivered—also, because, as a citizen, he thought that the receiving practices in the forward areas were loose to the point of being scandalous. They toured through about 300 miles of test-site and visited many compounds, most of which were completely unattended. In those that were manned, no one paid any attention to the visitors, though they were driving a private station wagon and could have helped themselves to various valuable materials and equipment, (Tr. 2060-2063).

2. Teamster Refusal to Handle Deliveries to Electrical Compounds Unless Staffed by Composite Crews.

We would be less than candid if we did not admit that Carter's inspection trip through the forward areas on April 21, 1964 was intended, at least in part, to bring pressure upon REECO to implement its promise to assign receiving clerks to the mixed-materials compounds, similar to the mixed-materials compound in Area #9.

Quite coincidently, however, this inspection trip also triggered the Teamsters' demand for composite staffing—pursuant to the Carter-Leigon Agreement—of all electrical compounds in forward areas where electrical materials were being stored for future use, and triggered the Teamsters' actions during the period from April 22nd, through April 28th in refusing to load, deliver, or permit offloading of materials at elec-

trical compounds unless compositely staffed by Teamsters and Electricians.

On April 21, 1964, while Carter and the AEC investigator were in Area #17 electrical compound, Carter observed eight Electricians loading a single pick-up truck (Carter, Tr. 2062). He was informed that they had been at it all morning. In the meanwhile, two Teamster-driven flat rack delivery trucks were standing by, waiting to be unloaded, (Tr. 2062). Carter spoke to Taylor, the superintendent in charge, and demanded that there be an equal number of Teamsters to Electricians assigned to load and unload the trucks, in accordance with the Carter-Leigon agreement, (Tr. 2063-2065. Taylor said the area was just starting up and that although it might become a warehouse later, it was still an electrical compound where electricians were to do the loading and unloading, (Tr. 2065). Carter took the position that if it was not a warehouse, all the work belonged to the Teamsters because, under the Carter-Leigon agreement, Electricians had only been given composite-staffing rights in warehouses (Tr. 2065-66). Carter then ordered the two Teamster trucks to return their loads to the Area #12 warehouse and stay there until REECO put a composite crew of Teamsters and Electricians in the electrical compound to do the unloading, (Tr. 2066, 2068-2071).

The following day, Carter met with Lemon and Crockett, the REECO Project Manager, at the office of AEC. At this meeting, Carter informed REECO that the Teamsters were insisting that REECO comply with the Carter-Leigon agreement and the 1957 work assignment award and that until REECO complied, the Teamsters were going to refuse to deliver

any materials to the electrical compounds, (Tr. 2073-2077). REECO placed neither Crockett, Lemon nor Goreniger on the stand to dispute this testimony. Carter thereafter issued instructions to his business agents and stewards to stop only material going to electrical compounds "where the electricians were loading, unloading, and hauling it.", (Tr. 2078-2079). However, he learned later that in some cases the business agents and stewards had violated his instructions and had failed to make deliveries to other crafts where there were mixed loads and the first delivery was routed to an electrical compound, (Tr. 2079-2080). Teamster business agents, however, have "no authority to establish policy" for the union (T Exh. 36).

It will be noted that the above action took place before the rendition of the AGC Board award on April 30, 1964.

It seems self-evident from the above review that the proscribed acts complained of, which occurred from Arpil 22 to April 28, 1964 were intended to implement the Teamster demand for adherence by REECO with the Carter-Leigon agreement *as applied to composite crews in electrical compounds*—construed by the Teamsters to be field warehouses or yards. This is evident from the events which immediately preceded, and triggered, the Teamster refusal to deliver materials to electrical compounds between April 22 and April 28th. (Tr. 2062-2071).

On the other hand, the Teamster action during this period was not intended to implement the previously made Teamster demands for a receiving clerk in the mixed-materials compounds, nor for a Teamster fork-lift operator in such compounds. For the Union then

believed that the REECO officials were going to comply with the former demand, and abandoned the latter demand as economically unfeasible. In any event, since the non-existent job of receiving clerk in the mixed-materials compound was not then claimed by any other union, craft or class, had the union action been intended to implement a demand for assignment of such work, it would not have been a violation of Section 8(b) (4) (D). *Local 107, Teamsters (Safeway Stores),* N.L.R.B. 1961, 49 LRRM 1343; *Electrical Workers I.B.E.W. (Mechanical Contractors Ass'n),* 120 N.L.R.B. 158 (1959) 44 LRRM 1608. The Board evidently so found in its decision of December 16, 1964 in the Section 10(k) phase of this proceeding, for it completely ignored the Teamster demand or a receiving clerk and forklift operator in the mixed-materials compounds.

Nor was the Teamster action during this period from April 22nd to April 28th intended to implement the Teamster demand that REECO comply with the AGC award by assigning to Teamsters, rather than Electricians, the work of hauling materials from electrical compounds to points of use. This is self-evident —for the AGC award was not formally rendered until April 30th, and at that time the Teamster refusals to make deliveries to the electrical compounds had ceased, and normal work had been resumed.

Carter met with the REECO officials to discuss the AGC award on the afternoon of April 28th, (Tr. 310). However, at that time, REECO had not yet seen the award and asked for time to study it, to which Carter agreed (Tr. 2084; Tr. 310). Carter met again with the company officials on May 8th, and, at that

time, demanded to know whether the company was going to comply with the award. The company officials showed Carter the preliminary report of the NECA Committee dated May 7, 1964 (IBEW Exh. 2-B) and said that this was now a jurisdictional dispute because they had two conflicting awards from the same work, and that, therefore, the company was not going to comply with the AGC award (Tr. 2086).

Carter then informed the REECO officials that under Article III-E of the AGC Agreement, (Tr. 2091), the Teamsters were going to refuse to deliver materials to the electrical compounds until REECO complied with the AGC Board award, (Tr. 2089). REECO then took the position that the award did not require the Company to change any work assignments and that the Company was in compliance with the AGC Board award. (Tr. 365, 373-374). Carter then said:

"We will wait until you have or haven't before any action is taken.", (Tr. 2089; See, also, Tr. 2111).

On the same day, the Company prepared its Amended Charge, which is dated May 8th, but was filed with the Regional Director on May 11th. This charge specifies refusal to perform services, inducements not to perform service, and threats, coercion and restraint against REECO "on each of said dates." *The dates specified are April 22nd, to April 28th, inclusive.*

On May 11, 1964 the Union ascertained that REECO was not complying with the AGC award, (Tr. 2110), but was permitting electricians to haul materials from compounds to points of use. The Teamsters then refused to load or haul materials from the Supply Department warehouses to the electrical compounds. That afternoon, REECO took the Teamsters refusing

to handle materials off pay status. This triggered the picketing which commenced May 12, 1964, (Tr. 2110-13).

This, then, represented the third stage of the dispute which developed through three distinct phases:

First, the dispute over receiving clerks and forklift operators in the mixed-materials compounds was settled, by what the Union thought was a company agreement to install receiving clerks, and by union abandonment of the claim for assignment of a forklift operator. These demands were never implemented by a work stoppage or picketing.

Second, the demand for adherence to the Carter-Leigon Agreement through composite-staffing of the electrical compounds in forward areas was implemented, during the period from April 22 to April 28, 1964, by refusals of Teamsters to load and haul electrical and (contrary to Union instructions) other materials, to forward area compounds.

Third, commencing on May 11, 1964, the Teamsters' refusal to load and haul, and, commencing on May 12, 1964, their picket line, was intended to implement the Teamster demand that REECO comply with the AGC award that, in accordance with area practice, Teamsters do the hauling of materials between electrical compounds and worksites—except when materials were transported by electricians' work trucks remaining at the site of work and not shuttling back and forth for additional materials.

The above, in a nutshell, is the essence of the successive Teamster demands, and the economic action taken by Teamster Local #631 to enforce them.

Questions Presented.

1. Whether primary jurisdiction over the disputed issues was vested in the Federal District Court in view of the facts and circumstances of the case.
2. Whether the National Labor Relations Board improperly exercised jurisdiction in its determination that a jurisdictional dispute existed which required the Board to invoke its powers under Section 10(k) of the Act.
3. Whether the Order of the Board is sufficiently clear and specific, and whether such a board blanket order was justified.

ARGUMENT.

The Respondent's argument proceeds, in effect, as follows:

1. The Carter-Leigon Agreement, whereby two unions allocated work between themselves, having long recognized and given effect by their common employer as the Board itself found, in its Section 10(k) decision was a "Contract" entitled to judicial interpretation and enforcement under Section 301 of the Act.

2. When, on May 21, 1964, and before the filing of Complaint herein by the Regional Director, the Respondent herein filed suit in the United States District Court for enforcement of its contractual rights against REECO, in which the IBEW intervened, the District Court was clearly vested with jurisdiction to determine whether or not such a contract existed and its meaning and applicability to the dispute.

3. Determination of such issues by the District Court adversely to claims of Respondent was a condition precedent to the right of the Board to assume jurisdiction, first, to make a Section 10(k) determination, and, second, to determine whether Respondent's acts in implementation of its claim to such work tasks constituted a violation of Section 8(b) (4) (D). For, if the contract issue should be determined by the Court in favor of the contract claims of Respondent, then acts of the Respondent in implementation of its contractual rights (under such tri-partite agreement between Teamsters, Electricians and the Employer); would not be for a proscribed purpose, and Respondent would not then be guilty of such proscribed acts for a proscribed purpose, as alone, would warrant interposition by the Board in a Section 10(k) proceeding.

Consequently, if determination by the District Court of the contract issues pending in Case No. 666 was a condition precedent to the existence of an unfair labor practice which would "trigger" the Board's jurisdiction, to argue, as did the Trial Examiner, that Respondent had no contractual rights which would preclude Board jurisdiction on the basis of what the Board found in a Section 10(k) decision which, if Respondent is correct, it was without authority to make, surely partakes of circular reasoning.

4. The Board's Order is insufficiently clear, unprecise, is too broad such as to be punitive rather than remedial, on excessive exercise of jurisdiction.

Argument I.

A long series of Supreme Court decisions interpreting the National Labor Relations Act, 29 U.S.C. 141, *et seq.,* has made it manifestly clear that labor contracts are not to be regarded as ordinary private contracts, but are vested with a public interest necessitating that they be construed and enforced in a manner designed to effectuate national labor policy. The Supreme Court has, therefore, thrown a high mantle of sanctity about the judicial enforcement of labor contracts, and, particularly, provisions therein calling for resolution of disputes under such contracts through the arbitral process.

In *Textile Workers v. Lincoln Mills* (1957), 353 U.S. 448, 40 LRRM 2113, the Supreme Court held that by enacting Section 301(a) of the Taft-Hartley Act, Congress had, not only created a federal forum and a procedural remedy for suits brought to enforce labor contracts, but that "the substantive law to apply

in suits under Section 301(a) is federal law which the courts must fashion from the policy of our national labor laws."

Subsequently, in its 1960 "arbitration triology" the[1] Supreme Court ruled that arbitration, when agreed to by the parties by the terms of their labor contract, is the very heart of the collective bargaining process.[2] Consequently, when exercising jurisdiction to compel compliance with a provision in a labor contract that all disputes "as to the meaning and application of the provisions of this Agreement" would be submitted to arbitration, the Court held that an "order to arbitrate the particular grievance should not be "denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes. *Doubts should be resolved in favor of coverage."* 363 U.S. 574, 582-83. (Emphasis supplied). The emphasis upon arbitration was said by the Court to rest in national labor policy: ". . . present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." 363 U.S. 574, 578.

---

[1]*United Steelworkers of America v. American Manufacturing Company* (1960), 363 U.S. 564, 46 LRRM 2414; *United Steelworkers of America v. Warrior and Gulf Navigation Company* (1960), 363 U.S. 574, 46 LRRM 2416; and *United Steelworkers of America v. Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 46 LRRM 2423.

[2]"But the grievance machinery under a collective bargaining agreement is at the very most of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement." *Steelworkers v. Warrior Navigation Co., supra.*

The Supreme Court has held, moreover, that the labor contracts cognizable and enforceable under Section 301(a) of the Taft-Hartley Act include more than purely consensual collective bargaining agreements between employer and union. Thus, in *John Wiley & Sons, Inc. v. Livingston* (1964), 376 U.S. 543, 55 LRRM 2769, the Supreme Court made it clear that, in the contest of labor relations, the consensual basis of arbitration must, at least in some circumstances, give way to the requirements of national labor policy, so that a corporate employer will be required to arbitrate with a union under a collective bargaining agreement between the union and another corporation which has merged with the employer, where there has been a "relevant similarity and continuity of operation across the change of ownership," *even though the employer was not a signatory to the agreement calling for arbitration.* And, in *Retail Clerks v. Lion Dry Goods,* 369 U.S. 17, 49 LRRM 2670, a "Statement of Understanding" negotiated through the efforts of a local mediation body in settlement of a strike, which provided that the employer would reinstate strikers without discrimination and which also contained an acknowledgment that the union was not then entitled to recognition as the exclusive representative of the employees, was held a "contract" within the meaning of Section 301(a) of Taft-Hartley and, therefore, enforceable in a suit brought thereunder. The Court declared that, "if this kind of strike settlement were not enforceable under §301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objectives of minimizing disruption of interstate commerce would be made more difficult." 369 U.S. 17, 27.

In *Lion Dry Goods,* the Supreme Court also recognized that a "no-raiding" agreement between two unions, as well as a collective bargaining agreement between employer and union, was a "contract" cognizable and enforceable under Section 301(a) of the Taft-Hartley Act. Thus, the High Court cited, with approval, the decision of the Court of Appeals for the 7th Circuit in *United Textile Workers v. Textile Workers* (1958), 258 F. 2d 743, 42 LRRM 2605, in the following words:

> "A federal forum was provided for action on other labor contracts besides collective bargaining contracts. See, e.g., *United Textile Workers v. Textile Workers Union* (CA 7, Ill.), 258 F. 2d. 743 (no-raiding agreement)." 369 U.S. 17, 26.

Substantive federal law, therefore, recognizes as binding and enforceable, in a Section 301(a) suit, *an agreeemnt between two labor organizations to forbear from encroaching upon each other's jurisdiction. (United Textile Workers, supra).* In the last-cited case, disregarding a "no-raiding" agreement between the two unions, Defendant union organized employees at a plant who had long been represented by Plaintiff union and petitioned the Board for a representation election. Following a Board hearing on the petition, but before its decision, an arbiter appointed under the "no-raiding" agreement held a hearing and found that by organizing such employees and petitioning the Board to represent them, Defendant union had violated the "no-raiding" agreement. Although this arbitral award was called to the attention of the Board, the Board thereafter issued its decision, specifically rejecting the contentions made under the "no-raiding"

agreement and ordering a representation election. Upon the petition of the Plaintiff, the Federal District Court thereupon issued an injunction requiring Defendant union to withdraw its representation petition from the Board. Affirming this decision, the Court of Appeals, in the decision, later cited with approval by the Supreme Court in *Lion Dry Goods,* said

> "One of the central findings of fact made by the district judge lays bare the core of the practical situation before us: 'Unless defendant is ordered to withdraw its petition, the National Labor Relations Board will, pursuant to its decision issued April 16, 1958, in Case No. 13-RC-5738, conduct a representative election on * * * (Defendant's) petition among the employees of Personal Products Corporation and the *plaintiff will be irreparably injured and its rights under the Agreement will be frustrated and denied.*' There is nothing in this record showing duress or coercion exerted on the defendant Union to induce it to become a party to the Agreement it now anxiously seeks to repudiate.
>
> "We think it quite clear that the defendant union engaged in a course of activity designed to disrupt Plaintiff's established bargaining relationship with Personal Products Corporation at its Chicago plant. David L. Cole, the impartial umpire, found this to be the situation and defendant, apparently, does not seriously controvert the fact. Of course, the Umpire's function is to decide whether the act complained of constitutes a violation of the Agreement, and this the Umpire must do irrespective of whether there are adequate or effective remedies to follow. If we struck down §301, the aim of the 'No-Raiding' agreement would be nullified and it would

be the same old familiar story where men enter into an agreement, one party to which either knows in advance, or later seeks to escape, because there is no enforcing apparatus. Apparently, Congress realized that without coercive measures placed in the hands of parties to agreements, the paper bearing empty words becomes a useless thing. Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120 (1957) manifests such an awareness. . . .

"The defendant Union is urging that despite its contractual commitment with plaintiff Union, it is free to raid and capture members belonging to plaintiff, because federal courts are without jurisdiction to compel obedience to Non-Raiding Contracts. We disagree." (Emphasis supplied).

In *Firemen and Oilers v. Machinists* (1964 CA 5th). 338 F. 2d 176, 57 LRRM 2459, the Court of Appeals for the Fifth Circuit affirmed the jurisdiction of the Federal district court, under Section 301(a) of the Taft-Hartley Act, to enforce an arbitral award holding that efforts of one certified union at the plant to obtain work claimed by another certified union constituted a violation of the AFL-CIO No-Raiding Agreement. The reviewing Court held that the arbiter did not exceed the scope of his authority in so holding, and the District Court did not abuse its discretion in enforcing such award in a Section 301(a) proceeding *even though the National Labor Relations Board had concurrent jurisdiction* over the matter and was the superior authority in the premises.

It is but one short step from *John Wiley & Sons, Lion Dry Goods, United Textile Workers* and *Firemen and Oilers,* to the situation presented by the record in

this case. The record clearly shows that an agreement allocating work tasks involved in the warehousing and transportation of electrical materials at the Nevada Test Site was negotiated between international representatives of the Teamsters (IBT) and the Electricians (IBEW), and was executed upon their direction on February 29, 1952 by William F. Carter, Secretary-Treasurer of Teamsters Local #631 and Ralph A. Leigon, Business Manager of Electricians Local #357. (Testimony of Carter, Tr. 1798, *et seq.*; Testimony of Leigon, Tr. 1018, *et seq.*; T's Exhs. 6A and 6B). In its decision upon the Section 10(k) phase of this case, the Board found that:

> "The record shows that from the time of its execution REECO followed the Carter-Leigon agreement in making work assignments and has referred to and relied upon said agreement as a basis for resolving conflict which arose between the Teamsters and IBEW."

In other words, in the Carter-Leigon Agreement we have a consensual agreement between two unions, which is more than a general "no-raiding" agreement, whereby both unions agree in general not to encroach upon the jurisdiction of the other. It is an agreement which actually allocates the specific work tasks which are to be performed by members of each union. It is, moreover, an agreement which has, for all practical purposes, been recognized and adhered to ever since its inception in 1952 by the common employer, REECO. If REECO did not actually affix its signature to the agreement, it is, nevertheless, as fully a party to the agreement as was, the non-consenting employer in *John Wiley & Sons, Inc.* We have then, here, within the

purview of national labor policy and the past decisions of the Supreme Court what must, at least arguably, be regarded as a tri-partite agreement relative to the allocation of work tasks between the two effected unions and their common employer.

If, under the decision in *United Textile Workers, supra,* the contractual rights of a union under a general "no-raiding" agreement with another union were entitled to equitable protection in a Section 301(a) suit, *notwithstanding the undoubted exclusive jurisdiction of the Board over questions of representation, and notwithstanding that the Board had already assumed jurisdiction* over the matter and had held a representation hearing, it would seem that *ipso facto* an agreement between two unions specifically allocating work tasks between their respective members, which agreement has been recognized and followed for many years by the common employer, would be similarly entitled to protection in a Section 301 suit, instituted by one of the Unions *before the Board had even assumed jurisdiction over the dispute.*

It is true that, in the Section 301 suit, as first instituted, the Teamsters were seeking enforcement of an arbitral award which did not, in terms, purport to base the rights of the Teamsters on the Carter-Leigon agreement, but upon area practice. However, the award found an area practice to exist which was parallel to, if not identical with, the allocation of work tasks (involved in hauling electrical materials) made by the Carter-Leigon Agreement, and also found that the Carter-

Leigon agreement may have had "the effect of modifying the relationship and understanding between the company on the one hand and the two unions on the other."[3]

---

[3]See Exhibit B attached to Complaint in Case No. 666, IBEW Exh. 1, and, particularly, Finding of Fact 7, and Conclusions 1 and 3. The Joint Conference Board refused to base its findings and conclusions on the Carter-Leigon Agreement solely because the AGC Agreement was a multi-employer agreement involving other contractors besides REECO and the parties had not complied with the formalities requisite to make the Carter-Leigon Agreement a part of the AGC Agreement. But the Joint Conference Board, nevertheless, stated in Conclusion 3:

> "It is entirely possible that the so-called Carter-Leigon Agreement may have the effect of modifying the relationship and understanding between the Company on the one hand and the two unions on the other but the Joint Conference Board has no power to modify the terms of the Master Agreement itself."

By finding in its Conclusion 2 that REECO's practice in transporting materials from compounds to actual work sites "is not in keeping with established trade practice in the area as contemplated by Article III F of the Master Labor Agreement", the Joint Conference Board must, undoubtedly, have been referring to Findings 5 and 6, preceding this Conclusion, which read as follows:

> "5. Flat Rack trucks were found at each yard or compound visited. Supervisory personnel stated that "such trucks are frequently employed by I.B.E.W. personnel to haul additional materials from the compounds or yards to the various locations as may be required during the course of the work day.
>
> "6. Supervisory personnel stated that Teamsters delivered materials to the compounds or yards and once the material was received by I.B.E.W. personnel Teamsters no longer handled nor transported such material."

When these Findings are considered in juxtaposition to Finding 3, there were I.B.E.W. personnel report at the compound "such electrical personnel may drive power wagons, diggers and work trucks to the location, which work trucks may also carry men and materials," it is clear that the A.G.C. Joint Conference Board regarded "established trade practice in the area" as paralleling the allocation of work tasks made by the Carter-Leigon Agreement. That is, as permitting Electricians to drive power wagons, diggers and work trucks carrying men and materials to the work site on the first trip of the day, but as forbidding Electricians from driving flat rack trucks, regarded as material trucks rather than work trucks "to haul additional materials from the compounds

(This footnote is continued on the next page)

Area practice existing at the time of execution of a collective bargaining agreement is part of the agreement, for it is now well-established that a collective bargaining agreement contains, not only what is therein expressed, but also much that is not therein expressed.[4]

---

or yards to the various locations as may be required during the course of the work day." (See and compare Carter-Leigon Agreement, Teamsters' Exhs. 6-A and 6-B, being part of GC's Exh. 3).

Though the Joint Conference Board, therefore, refused to enforce the Carter-Leigon Agreement, as such, it found an area practice to exist which conformed, in all respects, to the Carter-Leigon Agreement, and, in effect, ordered REECO to cease and desist from departing from such area practice. In its Section 10(k) decision, the National Labor Relations Board refused to give controlling effect to this award, on the ground that the award, itself, was the only evidence in the record of area practice, and that N.T.S. presented a unique situation. However, N.T.S. covers an area of 1500 square miles upon which many general contractors working under the A.G.C. Agreement are employed. It would seem that if N.T.S. is unique, a unique 1500 square mile area may, itself, give rise to an "area practice" and, certainly, the A.G.C. Joint Conference Board, administering the labor agreement under which all general contractors employed at N.T.S. work, would be in a better position than any other tribunal to know, or ascertain, the "trade practice in the area." It is also significant, we think, that, as the Board found in its Section 10(k) decision, no dispute cognizable under section 8(b) (4) (D) existed between the Teamsters and any other craft, although the record is replete with evidence that Teamsters normally hauled the materials of the other crafts from compounds to points of use, again establishing this to have been the "trade practice in the area", at least as to such other crafts.

[4]". . . The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . .

> "It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: '. . . . It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, to many unforceable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a com-

In asking the Federal Court, in a suit brought under Section 301 of the Act, to enforce the arbitral award, the Teamsters were, therefore, asking not only for enforcement of the express terms of the AGC Agreement to which Teamsters and REECO were parties, but also the area practice impliedly embodied therein, which had been established by the long-standing tri-partite understanding between Teamsters, Electricians, and REECO, as set forth in the Carter-Leigon Agreement.

It is important to note, moreover, that the Court's jurisdiction to enforce the contractual rights of the Teamsters had been invoked by filing Case No. 666 in the United States District Court on May 21st, six days before the NLRB assumed jurisdiction on May 27, 1964, by noticing a Section 10(k) hearing. An order to show cause why the AGC arbitral award should not be placed into immediate effect issued on May 21st, returnable on June 1st. On May 26th, the Regional Director filed in the same Court Case No. 669, a Petition for a Section 10(1) injunction, which was made returnable by the Court at the same time as the Order to Show Cause in Case No. 666. Both matters were, therefore, considered in a single hearing on June 1,

---

munity like an industrial plant to fifteen or even fifty pages . . . the collective bargaining " 'process demands a common law of the shop which implements and furnishes the context of the agreement. . . .' * * * Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. . . ." *Steelworkers v. Warrior Navigation Co.*, 46 LRRM 4216, 4218, 4219.

". . . collective bargaining contracts by their very nature cannot fairly be limited to their express provisions." *Pacific Northwest Bell Telephone Co. v. Communications Workers* (1962 C.A. 9th), 310 F. 2d 244, 51 LRRM 2405, 2406.

1964, at which the Regional Director was represented by counsel. The Regional Director must, therefore, be presumed to have known, before the commencement of the Section 10(k) hearing on June 4th, of the contract claims which had been asserted by the Teamsters in the Section 301 suit, and that the IBEW had moved for leave to intervene in the suit. Since the AGC Joint Conference Board award was attached as an Exhibit to the Complaint in Case No. 666, the Regional Director also presumably knew that the Teamsters were seeking enforcement of an award which, although in terms predicated upon area practice, rather than on the "Carter-Leigon" Agreement, had, nevertheless, recognized that the "Carter-Leigon" Agreement may have the effect of modifying the relationship and understanding between the Company on the one hand and the two unions on the other.

In view of the Regional Director's presumed knowledge of these facts, the question arises as to whether, under the circumstances, the Regional Director had authority to proceed, or should have proceeded with the Section 10(k) hearing, where the jurisdiction of the Court to enforce the contractual rights of one of the disputing unions had already been invoked under Section 301 of the Act, and where the contract sought to be enforced was, at least arguably, a tri-partite agreement between the two disputing unions and their common employer, preempting the disputed work tasks in favor of one of the unions. (Compare *United Textile Workers, supra,* where Defendant union was ordered by the Court to withdraw its representation petition, filed in derogation of a no-raiding agreement, though the representation petition was first filed and had already gone to hearing and decision before the Board. Compare, also,

National Association of Broadcast Engineers (National Broadcasting Co.) (1953), 105 NLRB 59, 32 LRRM 1268, recognizing that where there has been a contractual preemption of work tasks, a strike to enforce such contract rights is not a violation of 8(b)(4)(D).)

The Congressional policy of encouraging the parties themselves to adjust their own work task disputes, and of removing such adjustments from the sphere of Board action where they have done so, or have, at least, provided "agreed-upon methods for the voluntary adjustment" of such disputes, is set forth in Section 10(k) of the Act, and has been commented upon by the Supreme Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 55 LRRM 2042, 2044, in the following language:

> "The Board, as admonished by §10(k), has often given effect to private agreements to settle disputes of this character; and that is in accord with the purpose as stated even by the minority spokesman in Congress—'that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire.' "

Respondent, therefore, respectfully urges two basic propositions:

1. That the Carter-Leigon Agreement, recognized and adhered to since 1952 by REECO, was a tri-partite contractual preemption of the disputed work in favor of the Teamsters (*National Broadcasting Co.),*[5] fully

[5]In *National Broadcasting Co., supra*, the Board said: "* * * we are of the opinion that in assigning IATSE stagehands to light the shows of September 26 and October 12, NBC acted in derogation of the NABET contract. The Board is persuaded *to fail to hold as controlling herein the contractual preemption of the*

(This footnote is continued on the next page)

as enforceable in a Section 301 suit as the "no-raiding" agreements protected by the arbitrators and the Courts in *United Textile Workers, supra,* and *Firemen and Oilers, supra,* and fully as effectual as the union's contractual disclaimer of the right to represent certain classes of employees during the contract term which the Board refused to upset through the use of its processes (*Briggs Indiana Corporation)*[6] and is, therefore, to be regarded either as a pre-existing agreed-upon ad-

---

work in dispute, would be to encourage disregard for observance of binding obligations under collective bargaining agreements and invite the very jurisdictional disputes Section 8 (b) (4) (D) is intended to prevent. Moreover, contrary to the contents of NBC and IATSE, we do not consider the fact that NABET possesses neither certification nor Board order as precluding a determination that its contract covers the assignment of the work in dispute. This is so because a *literal construction* of Section 8 (b) (4) (D), in the circumstances in this case, *would require that the Board acquiesce in the invasion of an incumbent union's contractual rights by sanctioning the device of reallocating work assignments under color of an agreement with a rival union at a time when the applicable contract is in full force and effect. The incumbent union compelled thereby to strike to protect its contract* would be denied a determination in its favor in a 10(k) proceeding because it lacked a certification or Board order, a result wholly incongruous with the purpose of the Act to promote stability of bargaining relations and minimize industrial disputes * * *" (Emphasis supplied).

[6]In *Briggs Indiana Corp.* (1945), 63 NLRB 1270, 17 LRRM 46, a had, by the terms of a collective bargaining agreement, disclaimed the right to represent certain classes of employers during the life of the contract. The board refused to lend its processes to "confirm a result which the union agreed it would refrain, temporarily, from seeking to achieve." Although a question of representation was there involved, on principle, *Briggs Indiana Corp.* would seem to be indistinguishable. Why should the Board lend its processes to achieving a result in the instant case which IBEW, by the Carter-Leigon Agreement, and REECO, by its adherence to that agreement, had solemnly agreed that they would not seek to achieve.

"The desirability of discouraging raids among unions" has also recently been assigned by the Board as one of its reasons for expanding its contract-bar from two, to three years. *General Cable Corp.* (1962), 139 NLRB 1123, 51 LRRM 1444.

justment of the dispute within the policy of voluntarism expressed by Section 10(k), or, at least, as removing the Teamster economic action taken to enforce such contractual work task preemption from the sphere of an unfair labor practice proscribed by Section 8(b)(4)(D) *(National Broadcasting Co., supra, Operating Engineers, Local No. 12, infra)* and as, therefore, depriving the Board of jurisdiction to make a Section 10(k) determination as to such work tasks. *(Carey v. Westinghouse Electric Co., infra).*

2. That where the claim of such contractual preemption of work tasks had been first presented to the Court in a Section 301 suit, the Board should have suspended, or dismissed, its Section 10(k) hearing as one not yet ripe for adjudication, to await Court determination of the underlying contract issue, since a Court determination of non-preemption would have been a condition precedent to the Board's jurisdiction to make a Section 10(k) determination. (*Square Deal Co. v. N.L.R.B.*);[7] *Carey v. Westinghouse Electric Co., infra; Sinclair Refining Co. v. N.L.R.B., infra).*

---

[7]In *Square Deal Co.* (1964 CA 9th), 332 F. 2d 360, 56 LRRM 2147, 2151-52, the Court denied enforcement of the Board's order finding the employer to have violated Section 8(a)(1) and (5) of the Act by refusing to negotiate with the union during the contract term over grievances relating to operation of the employer's unilaterally-established incentive plan, or to furnish the union with information relevant to such grievance. The Court held that, in view of the employer's contention that the union had waived the right to grieve over this question by executing a contract in which such incentive plan was not mentioned, "the existence of an unfair labor practice here is *dependent* upon the resolution of a primary dispute involving *only* the interpretation of the contract." Answering the contention that under Section 10(a) of the Act, the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been established by agreement, law, or otherwise," the Court held the Board's plenary power to prevent un-

(This footnote is continued on the next page)

It appears to us, therefore, that, in deference to the primary competence of the Federal Court, under Section 301 of the Act, to determine whether or not a "contract"

---

fair labor practices inapplicable to a situation in which the claimed breach of duty stems not from the Act, but depends "solely upon a construction of the contract, an area in which the parties themselves have agreed that the dispute be arbitrated." Calling attention to the Board's own decision in *Hercules Motor Corp.*, 136 NLRB 1648, 50 LRRM 1021, as cited by the Court in *Sinclair Refining Company v. N.L.R.B., supra,* the Court concluded that "* * * the question whether the Union by contract has waived its right to grieve respecting the group incentive plan should have been submitted to arbitration. . . . In the absence of an arbitrator's decision on this issue the Board had no power to determine that the Company committed unfair labor practices."

By parallel reasoning, it could be said that, *ipso facto,* where an arbitral award holding the disputed work tasks to have been preempted in favor of the Teamsters was being questioned in a Section 301 suit brought to enforce the arbitral award, by both the company and the intervening union which laid claim to such work tasks, in the absence of the Court's decision on this issue the Board had no power to determine that the Teamsters had committed unfair labor practices, and, therefore, no authority to make a Section 10(k) determination.

While in *Square Deal Co.,* the Court held that jurisdiction of the Board was dependent upon the prior resolution of a question of contract construction by arbitration as called for by the labor agreement, in *Sinclair Refining Co. v. N.L.R.B.* (1962, CA 5th), 50 LRRM 2830, 2835, the Court went even further, holding that where the claim is made that a collective bargaining agreement is being breached, the dispute may be resolved, either through the arbitration machinery of the contract or through the courts, but that "in this aspect of industrial controversy, the Board is not available as a forum to achieve final resolution. This is because Congress, as a matter of deliberate choice, has rejected proposals by which a breach of contract would constitute an unfair labor practice." In reaching this result, the Court of Appeals noted the recent reminder of this fact by the Supreme Court in *Dowd Box Co., Inc. v. Courtney* (1962), 368 U.S. 502, 49 LRRM 2619, in which the Court quoted the following language from the Congressional Conference Report: "Once parties have made a collective bargaining contract, the conference report stated, 'the enforcement of that contract should be left to the usual processes of the law and not the National Labor Relations Board.' " Compare *Raytheon Co. v. N.L.R.B.,* 326 F. 2d 471, 55 LRRM 2101, holding that the Board must defer to the arbitration process "in view of the importance the Supreme Court lays upon the value of arbitration . . . in effecting the national labor policy."

cognizable under Section 301 existed, and to what extent such contract controlled the current work assignment dispute, and in deference to such contract (if judicially found to be existing and applicable) as a preemption of the disputed work tasks, and in obedience to the command of Section 10(k) that the charge be dismissed if the parties had either voluntarily adjusted, or arrived at an agreed-upon method for the voluntary adjustment of such dispute, the Regional Director should not have proceeded with the Section 10(k) hearing, and the Board should not have proceeded to adjudication, but that the charge should have been suspended or dismissed. *National Broadcasting Co., supra; Sinclair Refining v. N.L.R.B., supra; Square Deal Co., supra.*

Or, to express the matter in a different way, if the Court, in the Section 301 suit, should ultimately have found that, as a result of area practice recognized by both unions and their common employer, or, as a result of an actual tri-partite agreement between them, applicable in the context of the latter-day "forward area compounds", the disputed work tasks have been preempted by contract in favor of the Teamsters, then the Teamster action of May 11th in refusing to handle materials, and of May 12th and following, in striking and picketing, would have to be regarded as lawful action to enforce contract rights and not as an unfair labor practice proscribed by Section 8(b) (4) (D) If this be so, Board jurisdiction to conduct a Section 10(k) hearing would never have arisen.[8] *For the*

[8]The Board's jurisdiction to conduct a Section 10(k) hearing is triggered by occurrence of unfair labor practices in violation of Section 8(b) (4) (D). Absent such unfair labor practices, the Board has no authority to conduct a Section 10(k) hearing. *Carey v. Westinghouse Electric Corp.* (1964), 375 U.S. 261, 55 LRRM 2042, 2043, 2044.

Board has long held that work assignments may be preempted by contract between a union and an employer just as effectually as by Board certification or order, and when so preempted, a strike to enforce such preempted contract rights does not constitute an unfair labor practice violative of Section 8(b) (4) (D). National Assn. of Broadcast Engineers (National Broadcasting Co.) (1953), 105 NLRB 59, 32 LRRM 1268 1270.

To like effect is the recent decision of the Court of Appeals for the 9th Circuit in *N.L.R.B. v. International Union of Operating Engineers, Local No. 12* (1963 CA 9th), 323 F. 2d 545, 54 LRRM 2314, in which enforcement of the Board's order adjudging an unfair labor practice was denied after the Court found as a question of contract construction within the primary competence of the Court (and contrary to the findings of the Trial Examiner and the Board), that a later-made local contract between the union and the employer containing a lawful hiring hall provision, superseded, as a matter of law, an earlier national agreement between the parties which did not contain hiring hall provisions, and that, consequently, by threatening to strike in order to compel the discharge of an employee not hired through the hiring hall, "Local 12 was merely persuading the Employer to comply with a binding contractual agreement" and "did not engage in an unfair labor practice within the meaning of the National Labor Relations Act."

It was to decide the very question of whether the disputed work had been preempted by contract within the meaning of *National Broadcasting Co., supra* that Teamsters Local No. 631 filed its Section 301 suit in

the United States District Court. Since the existence,[9] as well as the legal effect, of a contract, or ordinarily matters for the Court, to be determined as a matter of law[10] and since, as the Supreme Court has said, once the parties have made their labor agreement, "the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board * * *," it appears to us that a determination by the Court as to whether the disputed work tasks had been preempted by contract was a condition precedent to the existence, or non-existence, of a Section 8(b) (4) (D) violation, in the absence of which the Board would have had no authority whatever to engage in a Section 10(k) hearing and determination. *Square Deal Co., supra.*

The arguments above presented are consistent with, although not completely controlled by, a recent series of decisions by the Supreme Court and the lower Federal Courts, which have made it manifestly clear that arbitration may not be denied merely because the National Labor Relations Board has concurrent jurisdiction over the same issues.

Thus, addressing itself to unfair labor practices, the Supreme Court said in *Smith v. Evening News Ass'n.*, 371 U.S. 195, 51 LRRM 2646, that:

---

[9]Thus, for example, the existence of a contract to arbitrate particular disputes has been held to be a matter for judicial determination, in the first instance, as a matter of law. *Steelworkers v. American Mfg. Co., supra* and *Concurring Opinion of Mr. Justice* Brennan.

[10]In *N.L.R.B. v. Int. Union of Operating Engineers, Local No. 12, supra,* the Court said: "Since *ordinarily the legal effect of a contract is determined by a court as a matter of law,* this court is not bound to accept the Trial Examiner's findings and conclusions in regard to the effect of the AGC contract upon the National Agreement. . . ." (Emphasis supplied).

"The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining "contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301 (to compel arbitration of the same dispute.)"

Following this decision, in *Carey v. General Electric Corp.* (1963 CA 2nd), 315 F. 2d 499, 52 LRRM 2662, the Court of Appeals upheld, with modification, a District Court decision requiring an employer to arbitrate grievances protesting assignment of work to employees represented by a different union, notwithstanding that the other union was not before the arbitration tribunal and that the employer claimed that this was a work-assignment dispute within the exclusive jurisdiction of the Board.

In *Carey v. Westinghouse Electric Corp.* (1962), 375 U.S. 261, 55 LRRM 2042, the Supreme Court set at rest all doubt upon this issue by holding definitively that bi-lateral arbitration of a work-assignment dispute may be compelled by a Court under Section 301 of the Act, notwithstanding that the other union claiming jurisdiction over such work is not before the arbitration tribunal, and notwithstanding that the Board may have concurrent jurisdiction to determine the dispute if it develops into an unfair labor practice. Compare *Firemen and Oilers, supra,* where a Court order enforcing the arbitral award of disputed work tasks to a union on the ground that the other union had violated a no-raiding agreement in securing them was upheld notwithstanding that the Board had concurrent jurisdiction over the dispute.

In *Humphrey v. Moore* (1964), 375 U.S. 335, 55 LRRM 2031, the Supreme Court held squarely that

even though certain acts are, or might arguably be, an unfair labor practice, where the complaint based on such acts alleges that they are a breach of contract, the matter is one within the cognizance of the Courts under Section 301 of the Act. See *I.L.W.U. v. Kuntz* (1964 CA 8th), 334 F. 2d 165, 56 LRRM 2708.

Applying these principles to the case at bar, it is evident that the concurrent jurisdiction of the Board to make a Section 10(k) determination upon the work task disputes between Teamsters and I.B.E.W. (if such concurrent jurisdiction existed), would not preclude the Teamsters from resorting, as they did, to two-party arbitration before the AGC Joint Conference Board, and, having prevailed in such arbitration, from bringing a Section 301 suit to enforce the award (Case No. 666), even though the other union claiming jurisdiction over such work tasks (the I.B.E.W.) was not a party to the arbitration. In the circumstances of the present case, however, where the I.B.E.W. intervened in such Section 301 suit and where contractual preemption of the disputed work was claimed by the Teamsters as a consequence of what was asserted to be a tri-partite contract between Teamsters, I.B.E.W. and their common employer, it is respectfully submitted that the Board did not even have concurrent jurisdiction to make a Section 10(k) determination, absent a prior Court finding of non-preemption. For the same reason, if it should be sought to distinguish *Carey v. Westinghouse Electric Corp., supra,* as a case in which arbitration was ordered because, absent a strike, the Board's jurisdiction to conduct a Section 10(k) hearing had not yet matured, it can be argued with equal force that the Board's jurisdiction to conduct a Section 10(k) hearing here had not yet matured, and could not mature,

until the Court had first resolved the claim of contractual preemption against the contention of the Teamsters. *Square Deal Loan Co., supra; National Broadcasting Corp., supra.*

It is, therefore, respectfully submitted that:

1. The Board was without jurisdiction to render its Section 10(k) determination of the work task dispute; and

2. That the Board was without jurisdiction to find, in this proceeding, that Teamsters Local Union No. 631 has violated Section 8(b)(4)(D) through its refusal to make deliveries to electrical compounds between April 23 and April 28, 1964, in pursuance of its claim to composite staffing of such compounds, or by reason of its economic action on May 11th and its picketing which commenced on May 12th to implement the arbitral award recognizing the Teamsters' right to the work of hauling electrical materials from compounds to points of use and to implement the Teamsters' claim to contractual preemption of such work.

Argument II.

In the Absence of a Charge of Section 8(b) (4) (D) Violation Filed After Occurrence of Proscribed Acts, the Board Is Without Power to Initiate or Decide a Section 10(k) Proceeding, or to Adjudge Respondent Guilty of a Section 8(b) (4) (D) Violation.

In its Section 10(k) decision, the Board identified and determined two jurisdictional disputes:

1. The dispute over composite staffing of electrical compounds.

2. The dispute over the hauling of electrical materials from compounds to points of use.

The record discloses, and the Board found, that between April 22 and April 28, 1964, Teamster drivers refused to make deliveries to electrical compounds. It is clear from the record, however, that such action was intended to implement solely the Teamster demand for composite staffing of electrical compounds, and that the Teamsters' subsequent actions on May 11th in refusing to make deliveries, and during the period from May 12th to June 1, 1964, in striking and picketing, were intended to implement the AGC Joint Conference Board Award of April 30, 1964 (Exhibit B annexed to Complaint in Case No. 666, IBEW Exh. 1) which had, in effect, put its stamp of approval upon the Teamsters' claim of contractual preemption of the work of hauling electrical materials from compounds to points of use.

An examination of REECO's Original Charge, dated April 28, but filed May 5, 1964 (Tr. 317-318) will show that it pertains only to the economic action taken by the Teamsters during the earlier period, April 22 to April 28, 1964—with reference to the composite staffing dispute. Similarly, the Amended Charge, dated May 8, but filed May 11, 1964 shows upon its face that it complains solely of economic action taken during the April 22 to April 28, 1964 period. It is obvious, therefore, that both the Original Charge and the Amended Charge refer solely to acts in implementation of the composite staffing, and not the hauling, dispute, since the Teamsters' claim to the hauling work was pending before the AGC Joint Conference Board during the period of the earlier economic action, and had not been resolved in favor of the Teamsters until April 30, 1964.

Respondent respectfully urges that since the Board's jurisdiction to make a Section 10(k) determination must

be "triggered" by a strike or threat of strike in violation of Section 8(b)(4)(D), *Carey v. Westinghouse Electrical Corp., supra,* 55 LRRM 2042, 2043[11] and since a Section 10(k) proceeding must be initiated by a charge focusing upon unfair labor practices which have already occurred,[12] Board jurisdiction in this case fails

---

[11]That the Board's authority to make a Section 10(k) determination is "triggered" only by a strike, or threat or strike, is made manifestly clear from the words of the Supreme Court in *Carey:*

> "We have here a so-called 'jurisdictional' dispute involving two unions and the employer. But the term 'jurisdictional' is not a word of a single meaning. In the setting of the present case this 'jurisdictional' dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work. If this controversy is considered to be the former, the National Labor Relations Act (61 Stat. 136, 73 State. 519, 29 U.S.C. §151, et seq.) does not purport to cover all phases and stages of it. While *§8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, the Act does not deal with the controversy "anterior to a strike. The Act and its remedies for 'jurisdictional' controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under §10(k) to resolve the dispute."* (Emphasis added.)

[12]Section 10(k) of the Act provides, moreover, that "*whenever it is charged* that any person *has engaged* in an unfair labor practice within the meaning of paragraph (4) (D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen. . . . (Emphasis supplied).

It will be observed, therefore, that the Board does not act on its own motion in initiating a Section 10(k) proceeding, but acts only when it is *charged* that some person *has engaged* in the unfair labor practice of striking, or threatening a strike, in order to force or require an assignment of work.

Both the word, "charged" and the use of the past tense, "has engaged", are significant. The signification would appear to be that in order to trigger the Board's jurisdiction to hold a Section 10(k) hearing, proscribed acts directed to a proscribed object

—at least, so far as the determination of the hauling dispute is concerned—because no charge (either original or amended) was ever filed by REECO after occurrence of the economic action of May 11th and May 12th which was oriented towards implementation of the claim to the work of hauling electrical materials from compounds to points of use.

A construction similar to that which we place upon Section 10(k) was placed by the Court of Appeals for the 5th Circuit in *N.L.R.B. v. Fant Milling Co.* (1958), 258 F. 2d 851, 42 LRRM 2566, upon Section 10(b) of the Act. A certified union entered into negotiations with the employer, which continued without progress until May, 1954, when the union filed a charge with the Regional Director that the employer had violated Section 8(a) (5) of the Act by refusing to bargain. The Regional Director refused to issue the Complaint, but the charge remained pending. In October, 1964, while negotiations were still going on, the employer unilaterally put into effect a general wage increase without prior notice to the union, and, a few weeks later advised the union that it was withdrawing recognition and would refuse further bargaining. No new charge, or amended charged, was filed by the Union. However, the Regional Director, acting upon the original charge, pro-

---

must have occurred *before the filing of charge* and the charge must relate to acts which have already occurred.

It is significant, also, we think that Section 10(b) of the Act, which has to do with the initiation of unfair labor practices, generally says that, "whenever it is charged that any person has engaged in *or is engaging* in any such unfair labor practice," the Board is empowered to issue a complaint, while in Section 10(k), dealing specifically with violations of Section 8(b) (4) (D), the italicized language which pertains to continuing violation *in praesenti* is omitted, and only the words, *"has engaged"*, oriented to past violation of Section 8(b) (4) D), are used.

ceeded to file a Complaint which alleged refusal to bargain continuously since November 1953 and also alleged the institution of the unilateral wage increase in October, 1954, some five months after the filing of the charge. The Board, agreeing with its trial examiner, found that the employer's unilateral wage increase, although occurring several months subsequent to the original charge and not the subject of an amended charge, was properly included in the complaint, and found the employer guilty of the unfair labor practice of refusal to bargain, largely because of such unilateral wage increase.

Denying enforcement, the Court of Appeals held that Section 10(b) of the Act requires "that a charge must set up *facts* showing "an unfair labor practice * * * and the *facts must be predicated on actions* which have already been taken . . . the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge . . . it was not proper for the Board to proceed on the basis of the charge of May 20, 1964 and enter the order here before us bottomed upon actions taken more than four months later. . . . If the Board could thus adjudicate the rights of the parties on such subsequent actions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent *carte blanche* to expand the charge as they might please, or to ignore it altogether." (Emphasis by the Court.)

We are not unmindful of the fact that the decision of the Court of Appeals in the *Fant* case, *supra,* was reversed by the Supreme Court in *N.L.R.B. v. Fant Milling Co.* (1960), 360 U.S. 301, 44 LRRM 2236. However, we think that the grounds upon which the Supreme Court reversed make the *Fant* case distinguishable. Thus, citing its earlier decision in *National Licorice Co. v. Labor Board,* 309 U.S. 350, 6 LRRM 674, the Supreme Court noted that "where the violations set forth in the Complaint are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects," the Board may treat the entire sequence as one. The Court then observed that: "In the present case, as in National Licorice, the unilateral wage increase was 'of the same class of violations as those set up in the charge. * * *' The wage increase was 'related to' the conduct alleged in the charge and developed as one aspect of that conduct 'while the proceeding (was) pending before the Board.'" The Court then proceeded to limit the holding in the *Fant* case in the following significant language:

> "What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left '*carte blanche* to expand the charge as they might please, or to ignore it altogether.' 258 F. 2d., at 856, 42 LRRM 2566. Here we hold only that the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the board.'"

It will be observed, therefore, from this limiting language, that the Supreme Court did not disagree with the Court of Appeals in principle, but only in application. In other words, had the Supreme Court not been of the view that the unilateral wage increase instituted by the employer while the charge of "refusal to bargain" was pending before the Board was "related to", and of the "same class" as, a "continuation of", and in "pursuance of the same objects" as the earlier manifestations of its "refusal to bargain," the Supreme Court may well have upheld the view of the Court of Appeals *that unrelated conduct occurring after the filing of the charge may not properly be made a subject of the Board's complaint.*

Applying these thoughts to the case at bar, we respectfully submit that economic action taken by the Union to enforce an arbitral award holding that the Union has a contractually preempted right to the work of hauling electrical materials from compounds to points of use, is not "related to", of the "same class" as, a "continuation of", and in "pursuance of the same objects" as economic action taken to implement an earlier demand that electrical compounds be staffed by composite crew of Teamsters and Electricians. The charge of "refusal to bargain", which was involved in the *Fant* case, *supra,* is one often resting on circumstantial evidence and to be gleaned by the whole course of conduct of the employer over a period of time, which course of conduct may properly include consideration of post-charge acts which are so related to the earlier conduct that they may properly be deemed part of the whole sequence of circumstantial evidence. These considerations are hardly relevant to 8(b) (4) (D) charges

against a union, which are usually susceptible of proof by direct, rather than circumstantial, evidence, and which may well involve divergent claims to completely unrelated work tasks, the right to which rests upon unrelated circumstances of area practice, skills, efficiency, history and tradition.

Finally, as we have already noted, while a violation of Section 8(b) (4) (D) is an unfair labor practice, it is only unfair labor practice singled out for special procedural treatment in Section 10(k) of the Act, the procedure relating to other unfair labor practices being set forth in Section 10(b) of the Act. And significantly, while Section 10(b) speaks of a charge "that any person has engaged in *or is engaging* in any such unfair labor practice," the italicized language does not appear in Section 10(k) which is framed in terms of reference to acts which have already taken place in the past, *i.e.,* "whenever it is charged that any person *has engaged* in an unfair labor practice" within the meaning of Section 8(b) (4) (D).

We respectfully submit that this difference in language and treatment is not accidental, but arises in direct consequence of the fact that under the Congressional scheme, the Board was given jurisdiction to make work task determinations only when the proscribed acts for the proscribed objects had already occurred. At the risk of undue repetition, we quote again from the words of the Supreme Court in *Carey v. Westinghouse Electric Co., supra:*

> "While §8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with*

> *the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike. The Act and its remedies for 'jurisdictional' controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under § 10(k) to resolve the dispute."* (Emphasis supplied).

We respectfully submit, therefore, that since the jurisdiction of the Board to make a Section 10(k) determination in a work task dispute is triggered only by a strike or threat of strike for the prohibited object, in the case of Section 8(b) (4) (D) violations, unlike other unfair labor practices, the charge must relate to unfair labor practices *which have already occurred,* and the Board is without jurisdiction to base its Complaint on acts occurring subsequent to the filing of the charge. Just as the occurrence of acts constituting a violation of Section 8(b) (4) (D) is the "trigger", so is the charge predicated on such acts, the limit, of the Board's jurisdiction to conduct a Section 10(k) hearing.

What the Court of Appeals said in *N.L.R.B. v. Fant Milling Co., supra,* and what the Supreme Court did not reject in principle, is, therefore, true and particularly applicable here (42 LRRM 2568-2569):

> "Since the authority of the Board derives solely from the statute, it is clear that effective action can be taken only when the machinery set up by the statute is substantially followed. It is further clear that a charge must set up *facts* showing an unfair labor practice as defined in 29 USCA §158,

and the *facts must be predicated on actions which have already been taken.* When the Board is satisfied that the facts contained in the charge have been substantiated, it or its agents then have power to issue and serve upon the person charged with the improper action 'a complaint stating the charges in that respect.' This language can have no meaning except that the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge." (Emphasis by the Court).

Since neither the original charge (dated April 28, 1964), nor the amended charge (dated May 8, 1964) charged the Teamsters with proscribed acts for the purpose of implementing their demand for assignment to them of the work of hauling electrical materials from compounds to points of use, the Board was without authority to make a Section 10(k) determination on this issue, and we respectfully submit that so much of its Decision and Determination of Dispute of December 16, 1964 as purports to do so is void and of no effect. For the same reasons, we respectfully urge that the Board is without jurisdiction in the present proceeding to determine that the Teamsters violated Section 8(b)(4)(D) as a result of their actions from May 11, 1964 to June 1, 1964, taken in implementation of the same demand.

Argument III.

The Board's Order is excessively broad and raises serious questions as to its meaning and application.

The petitioner alleges that the words "or any other person" in the Board's Order "simply means that Teamsters cannot use coercive and unlawful means to force or require any successor employer to REECO at N.T.S. to assign the work in dispute to Teamsters." The Board's Order is not so specific as is alleged.

The Order is not specific with reference to person, time or place.

There is nothing in the record to support such conclusion that would justify such a broad Order.

The Board's Order is broader than the dispute than remedial. The Board is without jurisdiction to punitive jurisdiction. *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Conclusion.

The Respondent prays that this Court refuse to issue a decree enforcing in whole, or in part, the Order of the National Labor Relations Board, the subject of the Petition for Enforcement proceedings herein.

Dated March 10, 1968.

ROBERT L. REID,

Attorney for Respondent, Teamsters Chauffeurs, Warehousemen & Helpers Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT L. REID